OCT 13 1954
HAROLD B. WILLEY, Cle

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 336.

LAMBROS G. METRAKOS,
Petitioner,

vs.

NEW YORK CENTRAL RAILROAD CO. (Dismissed below),
THE CLEVELAND UNION TERMINALS COMPANY,
Respondent.

BRIEF OF PETITIONER IN REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit.

WILLIAM J. CORRIGAN,
Williamson Bldg.,
Cleveland, Ohio,
Attorney for Petitioner.

THEODORE T. SINDELL,
526 Standard Bldg.,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8647

TABLE OF CONTENTS.

Reply to Counter-Statement of the Question Presented ---------- 1

Reply to Counter-Statement to Petitioner's Statement and Facts ---------- 2

Reply to Respondent's Reasons for Denying the Writ_ 3

1. The Charge of the Trial Court Was in Error, and Substantially Prejudiced the Accomplishment of Justice and the Rights of the Petitioner 3

2. The Petitioner's Failure to Object to the Charge Does Not Bar the Court From Hearing on Appeal the Question of Whether the Charge Prejudiced Substantial Rights of the Petitioner, and Justice in the Case ---------- 7

Conclusion ---------- 9

TABLE OF AUTHORITIES.

Cases.

Boswell v. District of Columbia, 21 District of Columbia 527 ---------- 5

Cincinnati, Hamilton & Dayton Rwy. Co. v. Frye, 80 Ohio St. 289 ---------- 6

Durant Min. Co. v. Perey Consol. Min. Co., 93 Fed. 166 ---------- 5

Hormel v. Helvering, 312 U. S. 552, 61 S. Ct. 719 (1941) ---------- 7

Kieffer v. Blue Seal Chemical Co., 196 F. 2d 614---- 5

Patrick v. Graham, 132 U. S. 627 (1890)-------- 7

Readnour, Appellant v. The Cincinnati Street Ry. Co., Appellee, 42 O. O. 311, affirmed 42 O. O. 145---- 5

Robak v. Pa. R. Co., 178 F. 2d 485 ---------- 4

Rowlik v. Greenfield, 87 Fed. Supp. 997 ---------- 8

Shimabukuro v. Nagayama, 140 F. 2d 13 (D. C. Cir. 1944) ---------- 8

Traveler's Insurance Co. v. Gath, 118 Ohio St. 257-- 6

Willis v. American Barge Line Co., Inc., 87 F. Supp. 919 (1949) ---------- 8

Text.

Cyclopedia of Federal Procedure, Third Edition, Volume 9, pages 382 and 422 ---------- 3

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 336.

LAMBROS G. METRAKOS,
Petitioner,

vs.

NEW YORK CENTRAL RAILROAD CO. (Dismissed below),
THE CLEVELAND UNION TERMINALS COMPANY,
Respondent.

BRIEF OF PETITIONER IN REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit.

Petitioner prays that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in said Court in the case of *Lambros G. Metrakos v. New York Central Railroad Co.* (dismissed below), *The Cleveland Union Terminals Company,* on June 17, 1954, be granted.

REPLY TO COUNTER-STATEMENT OF THE QUESTION PRESENTED.

It is extremely interesting to note that the Respondent in his answer brief carefully avoids the main question raised in our Petition for Writ of Certiorari:

> "I. Is it error for a trial Judge in an action in the United States District Court for the Northern District of Ohio, Eastern Division, under the Federal Employers' Liability Act to charge the jury that the peti-

tioner must prove his cause of action to the satisfaction of the jury?"

This is no time to be splitting hairs on mere technicalities. It is important that this Court create a standard for all 48 states on this most vital question which involves millions of our citizens who work under an important Federal Act. The mere fact that no objection was made is of small consequence at this time, when the real question involves the interpretation of a federal statute.

We agree that the general rules reinforced by decisions require the making of timely objections. However, this Court and lower courts have on many occasions disregarded these narrow rules and decisions in the interest of real justice.

This case, as it now develops, is not so much a matter of justice to the petitioner alone—it affects justice to all railroad workers in the future.

REPLY TO COUNTER-STATEMENT TO PETITIONER'S STATEMENT AND FACTS.

While not conceding the facts to be as presented in Respondent's counter-statement, petitioner will not unnecessarily burden the Court at this point with argument on the facts. The issues here are the interpretation of a federal statute, the right to review and the legal propriety of a charge, not the facts of how the injuries involved took place. Arguments on facts seem improper to petitioner at this stage.

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT.

1. The Charge of the Trial Court Was In Error, and Substantially Prejudiced the Accomplishment of Justice and the Rights of the Petitioner.

In determining what is error, it is first necessary to determine what is correct. We have found no decision by the Supreme Court of the United States or by any Circuit Court of Appeals on the proper burden of proof to be applied in an F. E. L. A. case. We, therefore, urge, as we have done earlier, that the Court allow this Petition for Writ of Certiorari for the purpose of setting at rest an important federal question, and in addition for the purposes to be stated which are personal to this petitioner.

Respondent has made an effort to carry water on both shoulders. On the one hand, it attempts to convince the Court that no part of the District Judge's charge on the question of burden of proof is erroneous, and cases are cited in support of that position. An examination of these cases, as will later be shown, indicates they are not in point with the case at bar.

On the other hand, respondent concedes by inference that the trial judge once erroneously defined the burden, but this vice is defended by pointing out that the Court redeemed itself by making correct statements on the same point in other portions of the charge. With this we do not agree and the law supports our position.

Respondent has cited *Cyclopedia of Federal Procedure*, Third Edition, Volume 9, pages 382 and 422. The first citation is contained in a section which discusses proper charges which might have been made more proper. This is not our case. Ours is not a case where a lawful

charge is not polished enough. This is a case where a charge has been made which is contrary to law.

Respondent's second citation from the same text, along with the case of *Robak v. Pa. R. Co.*, 178 F. 2d 485, is employed to demonstrate that a charge is to be construed as a whole.

We agree that a charge is to be treated as a whole, and having said that, we assert that the error involved here rendered the charge as a whole seriously defective. This was an error relating to a fundamental legal issue, burden of proof. This was an error on a delicate issue often not easy to comprehend when the rule is stated correctly. This was an error not cured, but rather rendered more confusing to the jurors by the issuance of conflicting instructions. Petitioner would like to emphasize the last statement, for respondent, from pages 3 through 7 of his brief opposing certiorari attempts to state that because the burden of proof was stated correctly, the point at which it was stated incorrectly is cured. It should be pointed out that when the burden of proof was stated correctly no statement was made by the court to the effect that the jury is to ignore the incorrect statement of the burden of proof.

According to the respondent's novel theory, if a trial judge defines burden of proof four times correctly and one time incorrectly, then the errors have been cured. Carrying that theory to its logical conclusion, let us assume the judge makes three correct statements and two wrong ones, has the defect been cured? Without prolonging this argument, if one were to consider whether or not a judge's charge is prejudicial or not prejudicial on the basis of tallying up the score of right versus wrong statements, at what point would one ultimately arrive? All of the above points out how ridiculous one can become in defending a wrong position.

See *Boswell v. District of Columbia,* 21 District of Columbia 527, wherein the court stated that when instructions are inconsistent, the Court cannot tell which one the jury followed, and if there is error in either, there must be a new trial.

See also *Durant Min. Co. v. Perey Consol. Min. Co.* 93 Fed. 166 in which the Court said that an erroneous instruction is presumed to be prejudicial, and is not cured by a correct direction in another part of the charge. This principle has also been established by Ohio Courts. In *Readnour, Appellant v. The Cincinnati Street Ry. Co., Appellee,* 42 O. O. 311, affirmed 42 O. O. 145, the court said that when the court states a correct rule or principle of law and also states an incorrect rule or principle of law with reference to the same subject matter, no presumption arises that the correct rule was applied by the jury in consideration of the issue presented, and the error in giving the incorrect rule will be deemed prejudicial.

On pages 7 and 10 of its brief, respondent relies on the case of *Kieffer v. Blue Seal Chemical Co.,* 196 F. 2d 614. In that case, the question of an erroneous charge was not involved, the court pointed out that all that was involved there was, at worst, a charge which should have been amplified. Ours is not a case where mere amplification will help. There was a clearcut erroneous statement in the case at bar. How can we speculate as to which definition the jury adopted? As long as there is doubt on this subject it must be resolved in favor of the proposition that the jury was misled by the erroneous statement of the rule, otherwise it cannot be said petitioner had a fair trial under law.

No presumption arises that the jury followed the correct charges.

On page eight of its brief respondent characterizes our reference to *Cincinnati, Hamilton & Dayton Rwy. Co. v. Frye,* 80 Ohio St. 289 as being "misleading," and proceeds to demonstrate that the case of *Traveler's Insurance Co. v. Gath,* 118 Ohio St. 257 is controlling.

We wish to point out that the *Cincinnati* case has never been overruled, and stands for the proposition that the trial judge cannot charge a jury that they must be satisfied by a preponderance of the evidence.

The respondent on page 8 of his brief holds out the proposition that the opinion in the *Traveler's* case held language "reasonably satisfied by the weight or preponderance of the evidence" is a proper charge. This was not determined by the *Traveler's* case.

An examination of the case, however, reveals that the court held that language "or is more satisfactory to your minds" etc. is a proper charge. And in fact this same decision stands for the proposition enunciated by the leading cases of the state that the word "satisfied" is improper when used as a standard for burden of proof. Respondent by a play on words is confusing two propositions.

On page 8 of Respondent's brief it is stated that the *Traveler's* case held the use of the words "reasonably satisfied" was proper. Although the decision did not stand for this proposition, we assert that there is a vast difference between using "reasonably satisfied" and "satisfied" when charging a jury on burden of proof, because reasonably satisfied leaves room for a doubt whereas satisfied means there must be no doubt, as defined by Webster. Respondent is unfair when it cites cases to support the proposition that the use of the word satisfy is proper, when it turns out in truth and fact that none of the cases cited by the respondent directly hold that the use of the word satisfy or satisfaction in charging the jury on burden of proof is proper.

2. The Petitioner's Failure to Object to the Charge Does Not Bar the Court From Hearing on Appeal the Question of Whether the Charge Prejudiced Substantial Rights of the Petitioner, and Justice in the Case.

The respondent, on pages nine and ten of his brief opposing Petition for Writ of Certiorari argues with vigor that it is "completely settled" that objections to evidence or to a charge must be made before the jury retires. In support thereof *Patrick vs. Graham*, 132 U. S. 627 (1890), a case in which the charge to the jury is never an issue, is cited.

Nevertheless, it is not the petitioner's intention to dispute respondent's allegations and supporting citations to the effect that there is a clear general rule that timely objection must be made to errors for them to be appealable.

We believe that this general rule has been unnecessarily belabored, for the issue in this case is the equally clear exception to the general rule, not mentioned in respondent's brief, that in spite of the absence of objection below, a Court on appeal may correct errors where substantial rights of litigants are prejudiced or where justice requires the correction of the error.

This principle was enunciated clearly in *Hormel v. Helvering*, 312 U. S. 552, 61 S. Ct. 719 (1941), a case which was more extreme in overlooking failure to act at the trial than is our case. In that case the Court permitted the assertion of a new theory of liability at the appellate stage which was never presented for hearing below. The Court spoke as follows:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and

> under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice * * *. These decisions and orders like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice."

This principle found expression in a more recent case similar to the case at bar, *Willis v. American Barge Line Co., Inc.*, 87 F. Supp. 919 (1949).

In that case, as in the case at bar, there was a claim of a defective charge. However, no objection was taken at the time the error was committed. Because of the great principle enunciated by this Court, a superficial argument of failure to object was overlooked.

We cite the following cases wherein federal courts have approved the overlooking of failure to object: *Rowlik v. Greenfield,* 87 Fed. Supp. 997; *Shimabukuro v. Nagayama,* 140 F. 2d 13 (D. C. Cir. 1944).

CONCLUSION.

Respondent has not been able to overcome the points of law raised by petitioner. Respondent's brief impresses one with the feeling that it too realizes that there was a miscarriage of justice by reason of the erroneous charge. Otherwise, why would respondent rely so heavily on the defense that the petitioner's lawyer failed to make an objection to the court's charge. We feel that this Court will transcend a technical defense in order to determine a question never before presented to this Court.

No mere technicality should prevent this Court from laying down a fair standard on burden of proof to be applied to all F. E. L. A. cases in the federal district courts.

Respectfully submitted,

WILLIAM J. CORRIGAN,
Attorney for Petitioner.

THEODORE T. SINDELL,
Of Counsel.